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## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R06-OAR-2013-0060; FRL-9900-26-Region 6]**

#### **Approval and Promulgation of Implementation Plans; New Mexico; Prevention of Significant Deterioration; Greenhouse Gas Plantwide Applicability Limit Permitting Revisions**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA is proposing to approve portions of one revision to the New Mexico State Implementation Plan (SIP) submitted by the New Mexico Environment Department (NMED) to EPA on January 8, 2013. The January 8, 2013, proposed SIP revision adopts necessary rule revisions to the PSD plantwide applicability limit (PAL) permitting provisions to issue PALs to GHG sources. EPA is proposing to approve the January 8, 2013 SIP revision to the New Mexico PSD permitting program as consistent with federal requirements for PSD permitting. At this time, EPA is proposing to sever and take no action on the portion of the January 8, 2013, SIP revision that relates to the provisions of EPA's July 20, 2011 GHG Biomass Deferral Rule. EPA is proposing this action under section 110 and part C of the Clean Air Act (CAA or the Act). EPA is not proposing to approve these rules within the exterior boundaries of a reservation or other areas within any Tribal Nation's jurisdiction.

**DATES:** Comments must be received on or before **[insert date 30 days after publication in the Federal Register]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R06-OAR-2013-0060, by one of the following methods:

- *<http://www.regulations.gov>*. Follow the online instructions for submitting comments.
- E-mail: Ms. Adina Wiley at *[wiley.adina@epa.gov](mailto:wiley.adina@epa.gov)*.
- Fax: Ms. Adina Wiley, Air Permits Section (6PD-R), at fax number 214-665-6762.
- Mail or Delivery: Ms. Adina Wiley, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.
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*Instructions:* Direct your comments to Docket ID No. EPA-R06-OAR-2013-0060. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through <http://www.regulations.gov> or e-mail, if you believe that it is CBI or otherwise protected from disclosure. The <http://www.regulations.gov> website is an “anonymous access” system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment along with any disk or CD-ROM submitted. If EPA cannot read your comment due to technical difficulties and

cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption and should be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

*Docket:* All documents in the docket are listed in the <http://www.regulations.gov> index.

Although listed in the index, some information is not publicly available, e.g., CBI or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 AM and 4:30 PM weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. A 15 cent per page fee will be charged for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area on the seventh floor at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittals related to this SIP revision, and which are part of the EPA docket, are also available for public inspection at the Local Air Agency listed below during official business hours by appointment:

New Mexico Environment Department, Air Quality Bureau, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502.

**FOR FURTHER INFORMATION CONTACT:** Ms. Adina Wiley (6PD-R), Air Permits Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue (6PD-R), Suite 1200, Dallas, TX 75202-2733. The telephone number is (214) 665-2115. Ms. Wiley can also be reached via electronic mail at *wiley.adina@epa.gov*.

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

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## **I. Background for Our Proposed Action**

The Act at section 110(a)(2)(C) requires states to develop and submit to EPA for approval into the state SIP, preconstruction review and permitting programs applicable to certain new and modified stationary sources of air pollutants for attainment and nonattainment areas that cover both major and minor new sources and modifications, collectively referred to as the New Source Review (NSR) SIP. The CAA NSR SIP program is composed of three separate programs:

Prevention of Significant Deterioration (PSD), Nonattainment New Source Review (NNSR), and Minor NSR. PSD is established in part C of title I of the CAA and applies in areas that meet the NAAQS – “attainment areas” – as well as areas where there is insufficient information to determine if the area meets the NAAQS – “unclassifiable areas.” The NNSR SIP program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS – “nonattainment areas.” The Minor NSR SIP program addresses construction or modification activities that do not emit, or have the potential to emit, beyond certain major source thresholds and thus do not qualify as “major” and applies regardless of the designation of the area in which a source is located. EPA regulations governing the criteria that states must satisfy for EPA approval of the NSR programs as part of the SIP are contained in 40 CFR sections 51.160 - 51.166.

New Mexico submitted on January 8, 2013, regulations specific to the New Mexico PSD permitting program for approval by EPA into the New Mexico SIP. The January 8, 2013, SIP submittal includes the PSD permitting provisions that were adopted on January 7, 2013 at 20.2.74 NMAC to defer the application of the PSD requirements to biogenic carbon dioxide emissions from bioenergy and other biogenic stationary sources consistent with the EPA’s final rule “Deferral for CO<sub>2</sub> Emissions from Bioenergy and other Biogenic Sources under the Prevention of Significant Deterioration (PSD) and Title V Programs” (76 FR 43490) (hereafter referred to as the “Biomass Deferral Rule”). The January 8, 2013, SIP submittal also adopts regulations that provide NMED the ability to issue GHG PALs consistent with the “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits Final Rule” (77 FR 41051) hereafter referred to as the “Tailoring Rule Step 3”.

On July 12, 2013, the U.S. Court of Appeals for the D.C. Circuit issued its decision to vacate the Biomass Deferral Rule. See *Center for Biological Diversity v. EPA* (D.C. Cir. No. 11-1101).<sup>1</sup> At this time, EPA is proposing to sever and take no action on the portion of the January 8, 2013, SIP submittal that adopted the biomass deferral provisions.

Today's proposed action and the accompanying Technical Support Document (TSD) present our rationale for proposing approval of these regulations as meeting the minimum federal requirements for the adoption and implementation of the PSD SIP permitting programs.

#### **A. History of EPA's GHG-Related Actions**

This section briefly summarizes EPA's recent GHG-related actions that provide the background for this action. For more information about EPA's actions, please see the preambles for the identified GHG-related rulemakings discussed in the following paragraphs. The citations for each rulemaking are included below in footnotes to aid the reader.

EPA has recently undertaken a series of actions pertaining to the regulation of GHGs that, although for the most part are distinct from one another, establish the overall framework for today's final action on the New Mexico SIP. Four of these actions include, as they are commonly called, the "Endangerment Finding" and "Cause or Contribute Finding," which EPA issued in a single final action,<sup>2</sup> the "Johnson Memo Reconsideration,"<sup>3</sup> the "Light-Duty Vehicle

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<sup>1</sup> The July 12, 2013, order states "[it] is ORDERED, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown."

<sup>2</sup> "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66496 (December 15, 2009).

<sup>3</sup> "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17004 (April 2, 2010).

Rule,”<sup>4</sup> and the “Tailoring Rule.”<sup>5</sup> Taken together and in conjunction with the CAA, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they took effect on January 2, 2011, subjected GHGs emitted from stationary sources to PSD requirements; and limited the applicability of PSD requirements to GHG sources on a phased-in basis. EPA took this last action in the Tailoring Rule, which, more specifically, established appropriate GHG emission thresholds for determining the applicability of PSD requirements to GHG-emitting sources. PSD is implemented through the SIP system, and so in December 2010, EPA promulgated several rules to implement the new GHG PSD SIP program. Recognizing that some states had approved SIP PSD programs that did not apply PSD to GHGs, EPA issued a SIP call and, for some of these States, finalized a finding of failure to submit followed by a Federal Implementation Plan.<sup>6,7,8</sup>

For other states, EPA recognized that many states had approved SIP PSD programs that do apply PSD to GHGs, but that do so for sources that emit as little as 100 or 250 tpy of GHG, and that do not limit PSD applicability to GHGs to the higher thresholds in the Tailoring Rule;

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4 “Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule.” 75 FR 25324 (May 7, 2010).

5 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule.” 75 FR 31514 (June 3, 2010).

6 “Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule” 75 FR 77698 (December 13, 2010). New Mexico was not subject to the SIP Call.

7 “Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure to Submit State Implementation Plan Revisions Required for Greenhouse Gases” 75 FR 81874 (December 29, 2010). New Mexico was not subject to the SIP Call so EPA did not make a finding of failure to submit for New Mexico.

8 “Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan” 75 FR 82246 (December 30, 2010). New Mexico was not covered by the GHG PSD Federal Implementation Plan.

therefore, EPA issued the GHG PSD SIP Narrowing Rule.<sup>9</sup> Under that rule, EPA withdrew its approval of the affected SIPs to the extent those SIPs covered GHG-emitting sources below the Tailoring Rule thresholds. EPA based its action primarily on the “error correction” provisions of CAA section 110(k)(6). Under the GHG PSD SIP Narrowing Rule, EPA withdrew the approval of the New Mexico PSD SIP only to the extent that the New Mexico SIP covered GHG-emitting sources below the Tailoring Rule thresholds. EPA has since removed the Narrowing Rule restrictions from the New Mexico SIP because we approved the revisions to the New Mexico PSD program that were submitted on December 1, 2010, establishing appropriate GHG PSD permitting thresholds consistent with EPA’s Tailoring Rule. See 76 FR 43149, July 20, 2011.

#### **B. EPA’s Biomass Deferral Rule**

On July 20, 2011, EPA promulgated the final “Deferral for CO<sub>2</sub> Emissions from Bioenergy and other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs” (Biomass Deferral Rule). The Biomass Deferral delayed until July 21, 2014 the consideration of CO<sub>2</sub> emissions from bioenergy and other biogenic sources when determining whether a stationary source meets the PSD and Title V applicability thresholds.

The D.C. Circuit Court issued its decision to vacate the Biomass Deferral Rule on July 12, 2013.

#### **C. EPA’s Tailoring Rule Step 3**

On July 12, 2012, EPA promulgated the final “Prevention of Significant Deterioration

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<sup>9</sup> “Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting Sources in State Implementation Plans; Final Rule” 75 FR 82536 (December 30, 2010).



and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits” (GHG Tailoring Rule Step 3 and GHG PALs). Following is a brief discussion of the Tailoring Rule Step 3. For a full discussion of EPA's rationale for the rule, see the notice of final rulemaking at 77 FR 41051.

In the Tailoring Rule, we made regulatory commitments for subsequent action, including promulgating the Tailoring Rule Step 3. Specifically, we committed in Step 3 to propose or solicit comment on lowering the 100,000/75,000 major source threshold on the basis of three criteria that concerned whether the permitting authorities had the necessary time to develop greater administrative capacity due to an increase in resources or permitting experience, as well as whether the EPA and the permitting authorities had developed ways to streamline permit issuance. We committed to complete the Step 3 action by July 1, 2012.

The EPA finalized Step 3 by determining not to lower the current GHG applicability thresholds from the Step 1 and Step 2 levels at this time. We found that the three criteria have not been met because state permitting authorities have not had sufficient time and opportunity to develop the necessary infrastructure and increase their GHG permitting expertise and capacity, and that we and the state permitting authorities have not had the opportunity to develop streamlining measures to improve permit implementation. See 77 FR 41051, 41052.

The Tailoring Rule Step 3 also promulgated revisions to our regulations under 40 CFR part 52 for better implementation of the federal program for establishing PALs for GHG emissions. A PAL establishes a site-specific plantwide emission level for a pollutant that allows the source to make changes at the facility without triggering the requirements of the PSD program, provided that emissions do not exceed the PAL level. Under the EPA's interpretation of the federal PAL provisions, such PALs are already available under PSD for non-GHG

pollutants and for GHGs on a mass basis, and we revised the PAL regulations to allow for GHG PALs to be established on a CO<sub>2</sub>e basis as well. We also revised the regulations to allow a GHG-only source to submit an application for a CO<sub>2</sub>e-based GHG PAL while also maintaining its minor source status. We believe that these actions could streamline PSD permitting programs by allowing sources and permitting authorities to address GHGs one time for a source and avoid repeated subsequent permitting actions for a 10- year period. See 77 FR 41051, 41052.

## **II. Summary of State Submittal**

EPA's most recent approval to the New Mexico PSD program was on January 22, 2013, where we updated our approval of the NM PSD program to include the required elements for PSD permitting of PM<sub>2.5</sub> that were submitted on May 23, 2011. See 78 FR 4339. Since that time, the State of New Mexico has adopted and submitted one revision to the PSD program on January 8, 2013, affecting the following sections:

- 20.2.74.7 NMAC – Definitions,
- 20.2.74.320 NMAC – Actuals Plantwide Applicability Limits (PALs)

These revisions have been submitted to adopt and implement the GHG Biomass deferral provisions consistent with EPA's July 20, 2011 Final Rule titled "Deferral for CO<sub>2</sub> Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs", and the Tailoring Rule Step 3 permitting provisions consistent with EPA's July 12, 2012 Final Rule titled "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits". The New Mexico Environment Department received no comments on this rulemaking.

### **III. EPA's Analysis of State Submittal**

As explained more fully in the accompanying TSD in this rulemaking, New Mexico has adopted and submitted regulations that are substantively similar to the federal requirements for the permitting of GHG-emitting sources subject to PSD. The detailed analysis in our TSD demonstrates that the revisions to 20.2.74.7(AZ)(1) and 20.2.74.320 NMAC adopted on January 7, 2013, and submitted on January 8, 2013, appropriately revised the PSD PAL permitting requirements to provide the NMED the authority to issue GHG PALs, consistent with EPA's Tailoring Rule Step 3 for GHG PALs. Our analysis also demonstrated that non-substantive revisions adopted at 20.2.74.7(AZ)(1), (2), (2)(b), (3), (4), and (5) to correct typographical errors are also approvable.

Our analysis also demonstrates that New Mexico adopted revisions to the definition of "subject to regulation" at 20.2.74.7(AZ)(2)(a) NMAC on January 7, 2013, and submitted on January 8, 2013, for the GHG biomass deferral rule. The D.C. Circuit Court issued its decision to vacate EPA's Biomass Deferral Rule on July 12, 2013. At this time, we are proposing to sever and take no action on the submitted biomass revisions from New Mexico.

### **IV. Proposed Action**

EPA proposes to approve portions of the January 8, 2013, submitted revisions to 20.2.74 NMAC into the New Mexico PSD SIP. New Mexico's January 8, 2013, proposed SIP revision adopts the necessary rule revisions to provide NMED the authority to issue GHG PALs in the New Mexico PSD program. EPA has made the preliminary determination that the January 8, 2013 revisions to 20.2.74 NMAC are approvable because they are adopted and submitted in

accordance with the CAA and EPA regulations regarding PSD permitting for GHGs. Therefore, under section 110 and part C of the Act, and for the reasons stated above, EPA proposes to approve the following revisions to the New Mexico SIP:

- Substantive revisions to 20.2.74.7(AZ)(1) NMAC establishing GHG PAL permitting requirements,
- Non-substantive revisions to 20.2.74.7(AZ)(1), (2), (2)(b), (3), (4), and (5) to correct formatting, and
- Substantive revisions to 20.2.74.320 NMAC establishing the GHG PAL permitting requirements.

EPA is proposing to sever and take no action at this time on the submitted revisions to 20.2.74.7(AZ)(2)(a) NMAC. The D.C. Circuit Court issued an order to vacate EPA's Biomass Deferral Rule on July 12, 2013.

EPA is not proposing to approve these rules within the exterior boundaries of a reservation or other areas within any Tribal Nation's jurisdiction.

## **V. Statutory and Executive Order Reviews.**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Clean Air Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
  - does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
  - is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
  - does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
  - does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
  - is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
  - is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
  - is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
  - does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).
- In addition, this rule does not have tribal implications as specified by Executive Order

13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, and incorporation by reference.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: August 9, 2013

Samuel Coleman, P.E.

Acting Regional Administrator, Region 6.

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